IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 523

MIDDLETON & CO. (CANADA), LTD., *et al.*,

Petitioners,

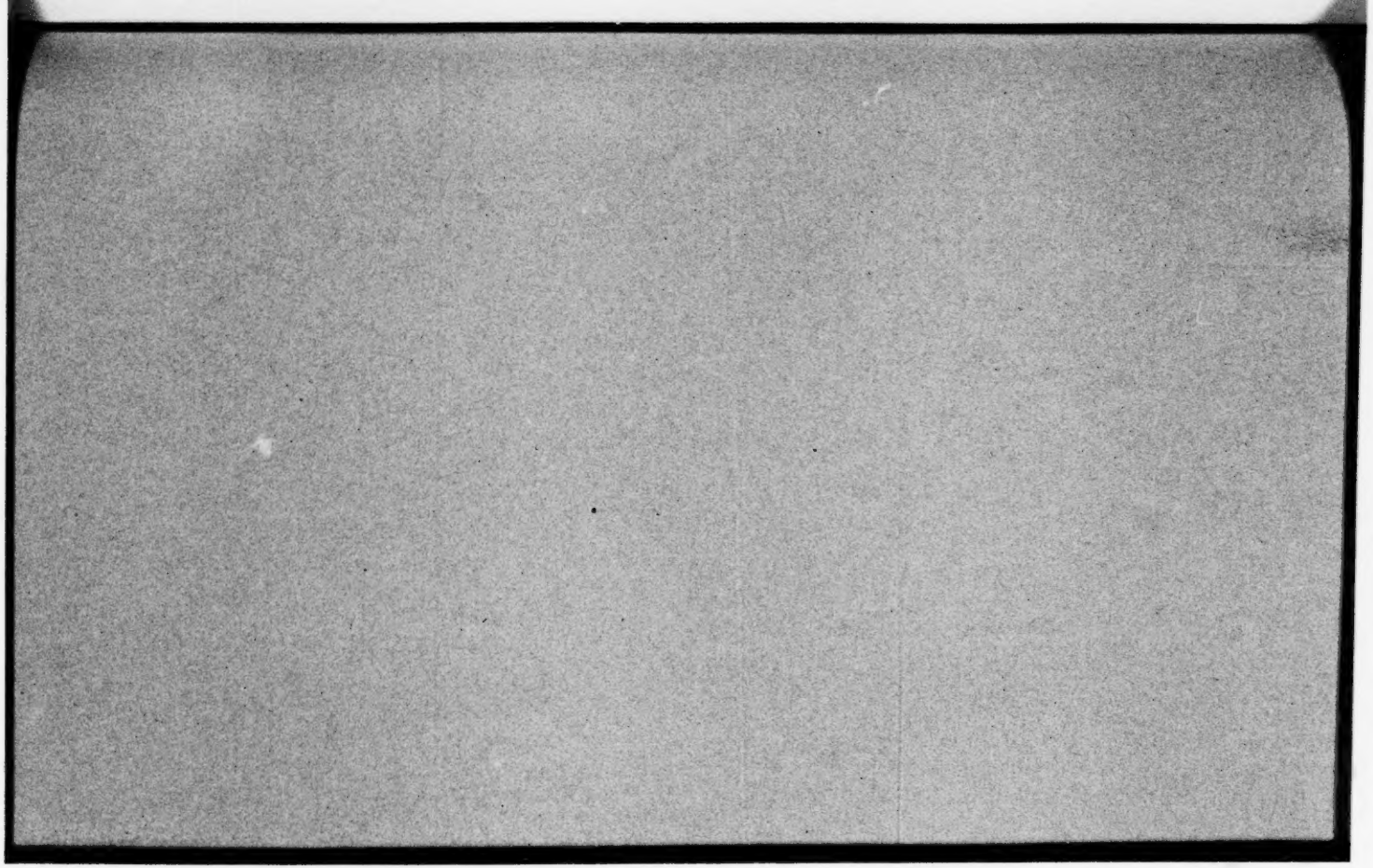
—against—

OCEAN DOMINION STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HENRY N. LONGLEY,
EZRA G. BENEDICT FOX,
Counsel for Petitioners.



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MIDDLETON & CO. (CANADA), LTD., et al.,
Petitioners,

—against—

OCEAN DOMINION STEAMSHIP CORPORATION,
Respondent.

The Petition of:

Middleton & Co. (Canada), Ltd.; Millers Products Corporation; Demerara Bauxite Company, Ltd.; Trinidad Agencies, Ltd.; West India Company, Ltd.; Aime Guertin, Limited; Connors Brothers, Ltd.; The Ogilvie Flour Mills Company, Ltd.; Lake-of-the-Woods Milling Company, Ltd.; Halifax Fisheries, Ltd.; Quoddy Sea Foods, Ltd.; H. T. Warne, Ltd.; G. P. Mitchell & Sons, Ltd.; The Steel Company of Canada, Ltd.; R. C. Pratt; R. C. Pratt, trading under the registered trade name of The Erie Flour Mills Company; R. C. Pratt, trading under the registered trade name of Toronto Export & Import Company; R. C. Pratt, trading under the registered trade name of Great Lakes Milling Company; F. I. Boates; J. Spencer Turner Company, Ltd.; A. M. Smith & Company, Ltd.; W. & C. H. Mitchell, Ltd.; Waterloo Bedding Company, Ltd.; Western Canada Flour Mills Company, Ltd.; Robin Hood Mills, Ltd.; James Pender & Company, Ltd.; Dominion Steel & Coal Corporation, Ltd.; W. M. Crombie & Co., Inc.; West India Oil Co. S. A.; Goodyear Tire & Rubber Company of Canada, Ltd.; Gutta Percha & Rubber, Ltd.; J. T. Swyers Company, Ltd.; International Milling Company, Ltd.; Standard Brands, Ltd.; O'Keefe's Brewing Company,

Ltd.; T. W. Hand Fire Works Company, Limited; The St. Lawrence Flour Mills Company, Limited; Libby, McNeill & Libby of Canada, Ltd.; Tors Cove Trading Co., Ltd.; Baine Johnston & Co., Ltd.; Henry Clement, Ltd.; Charles Mawdsley and James George Bullock McWhinnie, co-partners, trading under the firm name and style of Bowes & Kent; Pennington, Stevens & Taylor, Ltd.; Weiting & Richter, Ltd.; R. MacGuire & Co., Ltd.; A. D. Frischmann, trading as H. Frischmann; J. P. Santos & Co., Ltd.; Booker & Bros. McConnell & Co., Ltd.; Unilever, Ltd.; Harry St. George Butterfield, trading as Butterfield & Co.; Evan Hurst, trading as E. Hurst & Co.; Steers, Ltd.; William H. Scott, Ltd.; Charles Mercer; Canadian Canners, Ltd.; Kaufman Rubber Co., Ltd.; Monarch Battery Mfg. Co., Ltd.; Dominion Steel & Coal Corp., Ltd.; Eastern Car Company, Ltd.; James A. Lynch & Co., Ltd.; Murray & Gregory, Ltd.; T. Rankine & Sons, Ltd.; and McCormack & Zatzman, Ltd.; and Indemnity Insurance Company of North America, libellants' stipulator for costs;

for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Matter Involved.

Your petitioners, Middleton & Co. (Canada) Ltd., et al., were the owners or representatives of the owners of cargo which was laden on the Norwegian S. S. "Iristo" at the Canadian ports of Halifax and St. John, in March, 1937, for carriage to Bermuda and ports in the West Indies. Respondent, the voyage charterer of the vessel, a New York corporation, issued the bills of lading for the cargo. The vessel with all her cargo was lost during the voyage.

Three separate libels were filed by the various cargo owners against the respondent in the United States District Court for the Southern District of New York to recover for the loss of the cargo. These libels were subsequently consolidated under the above title. The District

Court entered a decree dismissing the libels. Thereafter the petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit which affirmed the decree of the District Court. The opinion of the Circuit Court of Appeals is reported at 137 F. (2d) 619 and it appears in the record at pages 753 *et seq.* The opinion of the United States District Court for the Southern District of New York is reported at 43 F. Supp. 29 and it appears in the record at pages 686 *et seq.*

None of the facts are in dispute: the factual evidence consists solely of the testimony of the ship's officers examined by the respondent, certain exhibits which it offered, and stipulations of the parties. The facts outlined in this petition are those found by the Circuit Court of Appeals supplemented by the findings of the District Court, none of which was reversed on appeal; and facts established by the testimony of respondent's witnesses and its exhibits. References to the opinion will be to that of the Circuit Court of Appeals.

Jurisdiction.

Jurisdiction of this Court is invoked under Article III, Section 2, of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. Code, Sec. 347).

The Nature of the Case.

The S. S. "Iristo" was owned by a Norwegian corporation and time-chartered to Atlantic Maritime Corporation which sub-chartered her to respondent for the voyage which this litigation concerns (Opinion, Rec., p. 753). Respondent put the vessel on berth at Halifax and St.

John as a common carrier of cargo to Bermuda and West Indian ports.

After the "Iristo" had loaded her cargo at Halifax and St. John, she sailed with Bermuda as her first port of call. None of the ship's officers had ever before sailed to Bermuda (Opinion, Rec., p. 754). The approaches to Bermuda from the north are particularly dangerous because it is necessary to skirt an arc of submerged reefs which lie north of the islands at a distance of some 10 miles (Opinion, Rec., p. 754).

A number of months before the "Iristo" sailed on her voyage, the S. S. "Cristobal Colon" stranded on the reefs north of Bermuda (Opinion, Rec., p. 755). As she was a large passenger steamer of some 24,000 tons, her wreck was very conspicuous to a navigator approaching Bermuda from the north (Opinion, Rec., p. 755). Long before the "Iristo" sailed, both the British Admiralty and the U. S. Hydrographic Office had issued charts showing the location of the wreck (District Court Finding 27, Rec., p. 716; Stip., par. 9, Rec., p. 656).

Safe navigation of the "Iristo" in approaching Bermuda required that her chart disclose the existence, location and characteristics of this wreck (Opinion, Rec., pp. 754, 755, 757, 758). The only chart on the vessel relating to Bermuda did not disclose the existence of the wreck and none of the officers of the "Iristo" knew of its existence either when the vessel sailed or at the time of her subsequent stranding (Opinion, Rec., pp. 754, 757).

As the "Iristo" approached Bermuda, her position was fixed by four-point bearings on North Rock Beacon lying outside the northern reefs (Opinion, Rec., p. 756). A course was then set which, if it had been followed, would have carried the vessel clear of all dangers (Opinion, Rec., p. 757). However, some time thereafter the second mate on watch and the master sighted the "Cristobal Colon"

which they erroneously assumed was a large passenger liner navigating toward them (Opinion, Rec., p. 756). On that assumption the master concluded that his small vessel of only some 1000 tons could navigate inshore of her with safety. He thereupon changed the course of the "Iristo" to starboard to make a port-to-port passage with this large vessel, which he thought was bearing down on him, in accordance with the International Rules of Navigation (Opinion, Rec., p. 756; District Court Finding 21, Rec., p. 715). Shortly thereafter the "Iristo" stranded because the change of course took her on the reef on which the "Cristobal Colon" was lying.

The "Iristo" was pulled off but as the result of bottom damage she sank shortly thereafter and became a total loss with all her cargo (Opinion, Rec., p. 756).

The officers of the "Iristo" were ignorant that they were to sail to Bermuda until they arrived at Halifax (Opinion, Rec., p. 755). Upon learning that Bermuda was to be the first port of call for the discharge of cargo, the master attempted at Halifax to secure a large scale chart for navigation to Bermuda. No large scale chart was available there but a small scale chart (Admiralty Chart #360), which the master did not consider sufficient for his needs, was offered to him (Opinion, Rec., p. 754). As the vessel was to call at St. John to complete the loading of her cargo, the master did not purchase the chart offered him, expecting to secure a more satisfactory chart at St. John (Opinion, Rec., p. 754). The chart offered him at Halifax showed the position of the wreck of the "Cristobal Colon" although the master did not make sufficient examination of it to know of this (District Court Finding 27, Rec., p. 716).

At St. John the master was also unable to secure a large scale chart but again a copy of Admiralty Chart #360 was available, and the master purchased this copy for use in navigating to Bermuda (Opinion, Rec., p. 754).

The chart secured did not disclose the location or existence of the wreck of the "Cristobal Colon"; indeed it showed on its face that it had not been corrected since 1932, or five years before the voyage on which the master was sailing and four years before the "Cristobal Colon" was wrecked (Opinion, Rec., p. 754).* When the "Iristo" sailed and when she stranded, this was the only chart on the vessel covering navigation to Bermuda (Opinion, Rec., p. 754).

Both the master and the chief officer negligently assumed that the chart secured at St. John was correct and up to date, although any examination of it would have disclosed that it was five years out of date—as the last date of correction was marked on its face (Opinion, Rec., pp. 754, 755). There was ample data available both at Halifax and St. John whereby any chart secured could have been brought up to date, but no effort was made in this regard because of the officers' negligent assumption that the chart was already up to date (Opinion, Rec., p. 755).

When the "Iristo" sailed on her voyage, the ship's officers intended to rely upon the copy of chart #360 secured at St. John as it then was, for navigation in approaching Bermuda. As they assumed that this chart was up to date, they had no intention of making any correction of the chart during the course of the voyage; and they made none (Opinion, Rec., p. 755; Master, Rec., pp. 593-5; Chief Officer, Rec., pp. 623-626).

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* At one point in the opinion of the Circuit Court of Appeals (Rec., p. 754), it is stated that a copy of Chart #360 offered the master at St. John, showed the existence of the wreck. This is erroneous. The only copy of this chart offered the master at St. John was the one he purchased (District Court Finding 27, Rec., p. 716) which, as it contained no information concerning the wreck, caused the disaster, as the Circuit Court of Appeals found. There is no testimony that any chart depicting the wreck other than the one available at Halifax, was ever offered the master.

Some months before the arrival of the "Iristo" at Halifax, while in the respective ports of Boston and Philadelphia, the master had called at the branch Hydrographic Offices in those cities and secured at each a collection of booklets containing Hydrographic Office Notices to Mariners. In one of the booklets included in each collection, was adequate data concerning the existence and location of the wreck of the "Cristobal Colon" and describing the wreck as "conspicuous" (Opinion, Rec., p. 754). The ship's officers glanced through these booklets when they were secured for data concerning their immediately subsequent voyages (Opinion, Rec., pp. 754-5; Master, Rec., pp. 574, 576; Chief Officer, Rec., pp. 618-619, 635). No study of them was made in relation to Bermuda as the officers were not then aware that they were ever going to sail there. None of the officers noted the data in relation to a wreck off Bermuda (Opinion, Rec., p. 755; Master, Rec., pp. 599-600; Chief Officer, Rec., p. 635).

The Notice to Mariners secured at Philadelphia which contained data concerning the wreck, was kept with a large bundle of other Notices in the master's private dining room where it was not available to anyone other than the master (District Court Finding 28, Rec., p. 717; Master, Rec., pp. 555, 576, 600). The Notice secured at Boston which contained data in relation to the wreck, was placed in a large pile of other Notices to Mariners in a drawer in the chart room (Master, Rec., p. 579; Chief Officer, Rec., pp. 625-6).

None of the Notices to Mariners was ever examined by the ship's officers to ascertain if they contained any data in relation to Bermuda after they learned that they were to sail there, and they did not know that there was any information in them in relation to Bermuda (Master, Rec., pp. 585, 599-600; Chief Officer, Rec., pp. 626, 635; Second Officer, Rec., pp. 519, 529).

The officers remained in ignorance of the existence of the wreck of the "Cristobal Colon" up to the time of the stranding of the "Iristo" (Opinion, Rec., pp. 756-7).

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held:

(1) That the stranding and subsequent loss of the "Iristo" resulted from the omission from her Bermuda chart of any data in relation to the existence and position of the wreck of the "Cristobal Colon"; and that to have a correct and up-to-date chart which could be safely employed in her navigation, the position of the wreck should have been marked thereon (Opinion, Rec., pp. 755-8).

(2) That the officers of the "Iristo" were negligent, before the vessel sailed on her voyage, in assuming that the Bermuda chart secured was correct and up to date when it showed on its face that it was not; and in not bringing this chart up to date to disclose the existence and position of the wreck of the "Cristobal Colon" from the Notices to Mariners available on shore at Halifax and St. John (Opinion, Rec., p. 755).

(3) That, as the owner of the "Iristo" had used due diligence in engaging the ship's officers, the carrier was not liable for their negligence in omitting to correct the chart or examine the Notices to Mariners available on shore (Opinion, Rec., p. 755).

(4) That the "Iristo" was seaworthy when she sailed on her voyage because she was equipped with a chart of sufficient scale for navigation in approaching Bermuda and because there was data physically on board the vessel by which the chart could have been corrected during the voyage to show the existence and position of the wreck of the "Cristobal Colon" (Opinion, Rec., pp. 758, 759).

(5) That the officers of the "Iristo" were negligent, during the course of the voyage, in not correcting the chart to show the wreck and that their negligence related to management and navigation of the vessel within the exemptions of Article IV (2)[a] of the Canadian Water Carriage of Goods Act (Opinion, Rec., p. 758).

Since the shipments in question were carried by sea from a Canadian port in 1937, the rights of the cargo owners and the duties and immunities of the carrier are governed, as the Circuit Court of Appeals held (Opinion, Rec., p. 757), by the provisions of the Canadian Water Carriage of Goods Act of 1936 (1 Edward VIII, Chap. 49), printed at pages 643-653 of the record. Its provisions, so far as concern the questions of law here involved, are identical with the provisions of the British Carriage of Goods by Sea Act of 1924 (14 and 15 Geo. V, c. 22) and the United States Carriage of Goods by Sea Act of 1936 (46 U. S. Code, Sec. 1300-1316). All three Acts give statutory effect to the so-called Hague Rules adopted by the Brussels Convention for the Unification of Certain Rules relating to Ocean Bills of Lading, which have also been enacted into law in many other countries. (For a list of such countries see Table at pp. 75-80 of *Knauth on Ocean Bills of Lading.*) The House of Lords and the Privy Council in England have already dealt with a number of cases interpreting these Rules. This Court, however, has to date not passed thereon.

The Questions Presented.

1. *Do the exemptions of Article IV, subsection 2 (a) of the Hague Rules* (46 U. S. Code, Sec. 1304, subsection 2 (a)) include negligence of a ship's officers in the management of the ship before sailing?*

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* The provisions of the Hague Rules applicable to this case, are set out in an Appendix to the brief.

In the instant case the chart secured for use in the navigation of the "Iristo" off Bermuda disclosed on its face that it was five years out-of-date. Means to bring the chart up to date before the voyage commenced were available; but no steps were taken in this regard before sailing because of the officers' negligent assumption that the chart was already correct and up-to-date; and, because of that negligent assumption, there was no intention to do anything about the chart after sailing.

The Circuit Court of Appeals held (Opinion, Rec., p. 755) that even under such circumstances the vessel was seaworthy and the carrier was entitled to exoneration from liability by virtue of Article IV, subsection 2 (a), of the Hague Rules (46 U. S. Code, Sec. 1304, subsection 2 (a)), which reads:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; * * *."

The English courts have held that this provision is to be read in the light of, and construed in harmony with, the interpretation heretofore given by the courts to the similar exemption contained in Section 3 of the Harter Act (46 U. S. Code, Sec. 192).* *Hourani* v. *Harrison*, 32 Com. Cases 305, at pp. 313, 315; *Foreman & Ellams, Ltd.* v. *Federal Steam Nav. Co.*, (1928) 2 K. B. 424, at p. 440; *Gosse Millerd* v. *Canadian Govt. Merchant Marine*, (1929) A. C. 223.

See also *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.* (*The Fred. W. Sargent*), 32 F. Supp. 520 at pp. 529-530 (E. D. Mich.).

The ruling of the Circuit Court of Appeals for the

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* The provisions of Section 3 of the Harter Act, are set out in an Appendix to the brief.

Second Circuit in the present case is in conflict with the interpretation given to Section 3 of the Harter Act by this Court and by the Circuit Courts of Appeals for the Fourth, Sixth and Ninth Circuits.

In *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, the vessel owner claimed exemption from liability under Section 3 of the Harter Act (46 U. S. Code, Sec. 192), providing that a vessel owner shall not be responsible "for damage or loss resulting from faults or errors in navigation or in the management of said vessel". There the negligence was that of the ship's officers, immediately before the commencement of the voyage, in not making secure certain porthole covers. Since they did not know that these covers were insecure at the time of sailing, they negligently assumed that everything was in order and had no intention of doing anything in respect of them after sailing.

The carrier argued that as its shore agents were in no way negligent and the negligence of the ship's officers related to management of the vessel, it was entitled to exemption from liability for damage to cargo which resulted from the porthole covers not having been made secure. This Court held (at p. 225):

> "And it is said that the owner does exercise such diligence by providing a vessel properly constructed and equipped, and that while he is responsible for the misuse or nonuse of the structure or equipment by his 'shore' agents, he exercises due diligence by the selection of competent 'sea' agents, and that he is not responsible for the acts of the latter, although they produce unseaworthiness before the commencement of the voyage.
>
> We cannot accede to a view which so completely destroys the general rule that seaworthiness at the commencement of the voyage is a condition precedent,

and that fault in management is no defence when there is lack of due diligence before the vessel breaks ground.

We do not think that a ship owner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

(at p. 226): "The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. *The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing.*" (Italics ours.)

That, also, is the English law.

Dobell & Co. v. *Steamship Rossmore Co.*, (1895) 2 Q. B. 408 (C. A.), at pages 413-414, 416, 417.

In *The Newport*, 7 F. (2d) 452, the Circuit Court of Appeals for the Ninth Circuit held that negligence of the vessel's engineers in the management of the vessel immediately prior to sailing did not come within the exemptions of Section 3 of the Harter Act, but rendered the vessel unseaworthy. See also its ruling in *S. S. Wellesley Co.* v. *Hooper & Co.*, 185 Fed. 733.

The Circuit Court of Appeals for the Sixth Circuit made a similar ruling in respect of the non-applicability of Section 3 of the Harter Act to negligent acts of the ship's officers committed before the voyage was begun, in *Gilchrist Transp. Co.* v. *Boston Ins. Co.*, 223 Fed. 716.

See, also, *The Maria*, 91 F. (2d) 819 (C. C. A. 4), discussed *infra* at pages 14-15.

Petitioners respectfully submit that this Court should determine whether or not the same interpretation which has been given to the scope and meaning of the phrase "faults or errors * * * in the management of said vessel" as set out in Section 3 of the Harter Act, should be given to the phrase "act, neglect, or default of the master, mariner * * * in the management of the ship" in Article IV, subsection 2 (a), of the Hague Rules (46 U. S. Code, Sec. 1304, subsection 2 (a)), and resolve the conflict as to the meaning of virtually identical exemptions now existing between the Circuits, by reason of the ruling in the instant case.

2. *Within the meaning of Article III, subsection 1 of the Hague Rules (46 U. S. Code, Sec. 1303, subsection 1), is there any difference, with respect to the carrier's responsibility, between charts and other navigating equipment on the one hand, and the physical structure of the vessel on the other.*

Article III, subsection 1 of the Hague Rules (46 U. S. Code, Sec. 1303, subsection 1) provides that:

> "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to (a) make the ship seaworthy; (b) properly man, equip, and supply the ship; * * *."

The Circuit Court of Appeals assumed that if negligence before the commencement of a voyage relates to a vessel's navigational equipment, a different principle is applicable than if the negligence relates to the physical structure of the vessel (Opinion, Rec., pp. 758-9). Petitioners submit that there is no difference in the principle applicable.

That issue was discussed and determined by the Circuit Court of Appeals for the Fourth Circuit in the case of *The Maria* (*supra*). There, as the court pointed out (91 F. (2d) at p. 821):

> "at the time of the accident, she was in fact navigated in reliance upon the faulty charts and navigational data which the master produced when his deposition was taken, and that, as a result, the stranding took place."

The court stated the question of law to be (at p. 820):

> "* * * whether the failure to furnish a ship with correct charts and similar data at the beginning of her voyage constitutes a lack of due diligence on the part of her owner to make her seaworthy, or is merely an error of navigation on the part of her master."

The court held (at p. 824):

> "Our view of the law, now that the point has been definitely raised, is that charts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them. Such documents of course become sources of information for the navigator, and the task of securing them is often delegated to officers of the ship. Failure to supply adequate information or navigation without it may thus constitute negligent navigation or management for which they are chargeable; but it does not follow that the owner is thereby relieved by

> the Harter Act from liability from ensuing disaster, because the same circumstances may also amount to failure on his part to use due diligence to make his vessel seaworthy. The duty of an owner in this respect is non-delegable; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship."

The conflict between the holding of the Circuit Court of Appeals for the Second Circuit in the instant case and that of the Circuit Court of Appeals for the Fourth Circuit in *The Maria* (*supra*) is, we think, clear.

3. *Does the fact that means are available on board to correct a defective condition render a vessel seaworthy notwithstanding the fact that both the defective condition and the availability of means to correct it are unknown to the vessel's officers?*

The antiquated chart secured at St. John by the officers of the "Iristo", coupled with their negligent assumption that it was correct and up to date; and the fact that they never intended to make any correction of the chart or examine any Notices to Mariners during the course of the voyage because of that assumption, was advanced by petitioners both in the Circuit Court of Appeals and in the District Court as the principal basis for their submission that the "Iristo" was unseaworthy.

The Circuit Court of Appeals held that the physical existence on the vessel of Notices to Mariners giving adequate data in relation to the wreck of the "Cristobal Colon" by which the chart could have been corrected, made the "Iristo" reasonably fit for navigation, even though the ship's officers were ignorant that the data was available, had no intention of searching for any such

data, and intended to use the chart in its uncorrected condition because of their negligent assumption from the start that it needed no correction (Opinion, Rec., pp. 754-5, 758-9).

Petitioners submit that under the facts of this case, the vessel was as inadequately equipped as if no data whatever concerning the wreck had been on board and was, therefore, unseaworthy for the voyage to Bermuda.

In considering the opinion of the Circuit Court of Appeals it will be noted that it accepts the general proposition that a vessel may be unseaworthy by reason of the ignorance of her officers of some defective or abnormal condition which requires special attention (Rec., pp. 758-9). Among the cases which it cites in this connection is its own earlier decision in the case of *The Elkton*, 49 F. (2d) 700, from which this Court quoted with approval in the case of *May* v. *Hamburg-Amerikanische etc.*, 290 U. S. 333 at page 348. The court distinguished the present case, however, on the ground that the rule applied in cases like *The Elkton* is limited to the physical structure of the vessel and has no application to navigational equipment such as charts. The opinion suggests also that the principle of these cases applies only where the owner is guilty of some personal fault or neglect (Rec., pp. 755, 758-9). We submit that neither of these suggested distinctions is tenable either on principle or authority. In this connection we rely upon the following cases which will be discussed in the brief submitted herewith:

Int. Nav. Co. v. *Farr & Bailey Mfg. Co.* (*supra*);
The Maria (*supra*);
The Elkton (*supra*);
The Fred E. Hasler, 55 F. (2d) 919 at p. 921 (C. C. A. 2);

The Pres. Polk-Pres. Adams, 43 F. (2d) 695 (C. C. A. 2);
The Schwan, 1909 A. C. 450, 461-3;
Standard Oil Co. of N. Y. v. *Clan Line Steamers Ltd.*, 1924 A. C. 100;
The Lady Pike, 21 Wall. 1, at pp. 14-15;
Tait v. *Levi*, 104 Eng. Reprints 686;
The Rolph, 299 Fed. 52, at p. 54 (C. C. A. 9);
Northern Commercial Co. v. *Lindblom*, 162 Fed. 250, 254 (C. C. A. 9).

REASONS FOR ALLOWANCE OF THE WRIT.

(1) The law laid down in the present case is in conflict with the law as settled in the Fourth, Sixth and Ninth Circuits.

(2) The law in the present case is contrary to the principle of decisions of this Court and of the British House of Lords.

(3) The Hague Rules were designed to obtain international uniformity and this Court should resolve any conflict as to their proper interpretation.

(4) The questions presented are of great commercial importance. The decision below encourages a carrier to exercise no diligence whatever in relation to the navigational equipment of his vessel beyond the selection of the officers: under this decision a carrier can escape all liability for loss of cargo resulting from insufficiency of navigational equipment of his vessel by leaving the whole matter in the hands of ship's officers.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of

this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket "Middleton & Co. (Canada) Ltd., et al., Libellants-Appellants, v. Ocean Dominion Steamship Corporation, Respondent-Appellee, Consolidated Cause, Docket #18,624"; and that the said decree of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray, etc.

Middleton & Co. (Canada), Ltd.; Millers Products Corporation; Demerara Bauxite Company, Ltd.; Trinidad Agencies, Ltd.; West India Company, Ltd.; Aime Guertin, Limited; Connors Brothers, Ltd.; The Ogilvie Flour Mills Company, Ltd.; Lake-of-the-Woods Milling Company, Ltd.; Halifax Fisheries, Ltd.; Quoddy Sea Foods, Ltd.; H. T. Warne, Ltd.; G. P. Mitchell & Sons, Ltd.; The Steel Company of Canada, Ltd.; R. C. Pratt; R. C. Pratt, trading under the registered trade name of The Erie Flour Mills Company; R. C. Pratt, trading under the registered trade name of Toronto Export & Import Company; R. C. Pratt, trading under the registered trade name of Great Lakes Milling Company; F. I. Boates; J. Spencer Turner Company, Ltd.; A. M. Smith & Company, Ltd.; W. & C. H. Mitchell, Ltd.; Waterloo Bedding Company, Ltd.; Western Canada Flour Mills Company, Ltd.; Robin Hood Mills, Ltd.; James Pender & Company, Ltd.; Dominion Steel & Coal Corporation, Ltd.; W. M. Crombie & Co., Inc.; West India Oil Co. S. A.; Goodyear Tire & Rubber Company of Canada, Ltd.; Gutta Percha & Rubber, Ltd.; J. T. Swyers Company, Ltd.; International Milling Company, Ltd.; Standard Brands, Ltd.; O'Keefe's Brewing Company,

Ltd.; T. W. Hand Fire Works Company, Limited; The St. Lawrence Flour Mills Company, Limited; Libby, McNeill & Libby of Canada, Ltd.; Tors Cove Trading Co., Ltd.; Baine Johnston & Co., Ltd.; Henry Clement, Ltd.; Charles Mawdsley and James George Bullock McWhinnie, co-partners, trading under the firm name and style of Bowes & Kent; Pennington, Stevens & Taylor, Ltd.; Weiting & Richter, Ltd.; R. MacGuire & Co., Ltd.; A. D. Frischmann, trading as H. Frischmann; J. P. Santos & Co., Ltd.; Booker & Bros. McConnell & Co., Ltd.; Unilever, Ltd.; Harry St. George Butterfield, trading as Butterfield & Co.; Evan Hurst, trading as E. Hurst & Co.; Steers, Ltd.; William H. Scott, Ltd.; Charles Mercer; Canadian Canners, Ltd.; Kaufman Rubber Co., Ltd.; Monarch Battery Mfg. Co., Ltd.; Dominion Steel & Coal Corp., Ltd.; Eastern Car Company, Ltd.; James A. Lynch & Co., Ltd.; Murray & Gregory, Ltd.; T. Rankine & Sons, Ltd.; and McCormack & Zatzman, Ltd.; and Indemnity Insurance Company of North America, libellants' stipulator for costs;

Petitioners.

By Henry N. Longley,
Ezra G. Benedict Fox,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

MIDDLETON & CO. (CANADA), LTD., *et al.*,
Petitioners,

—against—

OCEAN DOMINION STEAMSHIP CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

This is a suit within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article III, Sec. 2, of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of Feb. 13, 1925, 43 Stat. 938 (28 U. S. C. Sec. 347).

Statement.

The facts are sufficiently stated in the petition and will not be repeated here.

Specifications of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

(1) In holding that negligence of a ship's officers, before the commencement of the voyage, in relation to her navigational equipment, does not establish lack of due diligence in relation to seaworthiness but is negligence in management and navigation within the exemptions of Article IV, Subsection (2) [a] of the Hague Rules (Sec. 4 (2) [a] of the United States Carriage of Goods by Sea Act, 46 U. S. C. Sec. 1304, subsection 2(a)).

(2) In holding that a vessel equipped with a defective chart is seaworthy because data is physically on board by which the chart may be corrected, notwithstanding the fact that both the defective condition and the availability of means to correct it are unknown to the vessel's officers.

POINT I.

The exemption from liability for loss resulting from the "act, neglect, or default of the master, mariner, * * * or servants of the carrier * * * in the management of the ship" provided by Article IV, subsection 2 (a), of the Hague Rules* [46 U. S. Code, Sec. 1304, subsection 2 (a)] does not free the carrier from liability "for loss or damage resulting from" negligence of the ship's officers, before commencement of the voyage, in properly preparing the vessel for the voyage.

In the accompanying petition (at pp. 11-12) we have quoted from the opinion of this Court in *Int. Nav. Co.* v.

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* The provisions of the Hague Rules applicable to this case, are set out in the Appendix.

Farr & Bailey Mfg. Co., 181 U. S. 218; and (at pp. 14-15) from the opinion of the Circuit Court of Appeals for the Fourth Circuit in *The Maria*, 91 F. (2d) 819. In both cases Section 3 of the Harter Act was involved.

At page 10 of the petition we have cited the English decisions holding that the provision of the Hague Rules exempting a carrier from liability for negligence of a ship's officers "in the management of the ship", was borrowed from Section 3 of our Harter Act (46 U. S. Code, Sec. 192)* and is to be construed according to the interpretation previously given to the provision of the Harter Act exonerating a shipowner from liability "for damage or loss resulting from faults or errors in navigation or in the management of said vessel". In *Gosse Millerd* v. *Canadian Govt. Merchant Marine*, (1929) A. C. 223, after pointing out that the phrase "management of the ship" appearing in the Hague Rules, was taken from the Harter Act, Lord Hailsham went on to say (at p. 230):

> "I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; * * *."

Viscount Sumner, in his concurring opinion, also adverted to the fact that the Legislature, in using the phrase in question, must be deemed to have been aware of the judicial construction previously given those words and to have confirmed it ((1929) A. C. at p. 238). The dissenting opinion of Greer, *L. J.*, in the court below, was specifically approved by the House of Lords (at p. 236). Judge Greer said ((1928) 1 K. B. at p. 743):

> "It was felt by a large number of shipowners,

* The provisions of Section 3 of the Harter Act are set out in the Appendix.

> merchants, and bankers in this and other countries that it was desirable to make the laws of the countries interested in international trade as nearly as possible uniform with regard to the matters dealt with by the Harter Act * * * and any decision of our Courts as to its meaning is an authority which can be properly applied to the similar exception clause in the Carriage of Goods by Sea Act, 1924."

The statement of the Circuit Court of Appeals (Rec., p. 758):

> "We know of no decision where the neglect of the ship's officers to perform the routine labor of examining mariners' notices so as to bring navigation charts up to date and make them safe for navigation has been imputed to the owner"

is squarely contrary to the principle of the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Maria, supra,* which is considered at some length in the accompanying petition (at pp. 14-15).

In *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*), a routine inspection by the ship's officers of the port-hole covers at any time during the voyage would have disclosed that they were not made fast, yet this Court held that the vessel was unseaworthy.

In *Dobell & Co.* v. *S. S. Rossmore Co.*, (1895) 2 Q. B. 408, the vessel sailed with a port improperly caulked by reason of the negligence of the ship's carpenter who was admittedly a competent person. In respect of the resultant damage to cargo the carrier sought exoneration under a bill of lading exception which paraphrased the wording of Section 3 of the Harter Act and also provided that the shipment was (p. 409) "subject to all the terms and provisions of, and all the exceptions from liability contained in" that Act. The English Court of

Appeal overruled this defense and found in favor of the cargo owner on the ground that the exception of faults or errors in the management of the ship related only to negligence after sailing and not to a prior neglect which affected the seaworthiness of the vessel for the contemplated voyage.

In *The Newport*, 7 F. (2d) 452 (C. C. A. 9), ten minutes before the vessel got under way, the third assistant engineer received an order to turn steam into the after capstan preparatory to taking in the lines on leaving the pier. By mistake he turned a valve which admitted steam into a cargo hold through the smothering system and cargo stowed in that hold was damaged. The court held that the engineer's negligence was not a fault or error in management within the meaning of Section 3 of the Harter Act but that his act rendered the vessel unseaworthy for the voyage.

In *S. S. Wellesley Co.* v. *Hooper & Co.*, 185 Fed. 733 (C. C. A. 9), the court ruled that the carrier was not freed from liability under Section 3 of the Harter Act for loss of cargo caused by the negligence of the vessel's officers in permitting her to settle on the bottom during loading and list until her deck cargo fell overboard, since "the language of section 3 of the Harter Act clearly contemplates a distinction between the preparation for a voyage and the management of the same after it is begun * * *" (at p. 738).

In *Gilchrist Transp. Co.* v. *Boston Ins. Co.*, 223 Fed. 716 (C. C. A. 6), after a vessel's cargo had been loaded, she was moved out into the harbor and made fast to another vessel to await the opening of navigation. It was found that the master was negligent in not placing the vessel under steam when warned of an approaching storm; and

in not separating her from the vessel to which she was made fast when both were driven across the harbor by the storm. The Circuit Court of Appeals for the Sixth Circuit held that Section 3 of the Harter Act afforded no protection to the shipowner since the master's negligence in management occurred before the commencement of the voyage.

Construction of 46 U. S. Code, Section 1304, Subsection 2 (a) (Article IV, Subsection 2 (a) of the Hague Rules), was involved in *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.*, 32 F. Supp. 520 (E. D. Mich.). There the cargo was damaged by leakage of water from a pipe which the court found "froze while the cargo was being loaded" (p. 529). The court also found (at p. 529) that the carrier "relied on the master and the officers of the ship" to see that she was in proper condition; that so far as the master was concerned "it never occurred to him to do anything" about the piping; and that the mate "gave no thought to the possibility of the water line freezing". The court said (p. 531):

> "admitting that the officers of the ship were negligent, (the carrier) contends that their negligence was fault or neglect in the management of the ship for which it is exempt under the provisions of Section 1304 (2) (a). The basis of this contention is that the main water line was provided with a shut off valve in the engine room and that the officers could have closed this valve and thereby have avoided the danger of the line freezing and the water entering the cargo."

The court overruled this contention on the ground that Congress intended the words, "management of the ship" in the Carriage of Goods by Sea Act, "to have the same meaning as that assigned to them in the long line of decisions construing these words as used in the Harter Act"

(p. 530) and that the negligence in the case did not relate to management of the ship during the voyage, but rather to her seaworthiness. The court further ruled (p. 532):

> "I hold that under the 1936 Act, where unseaworthiness of the vessel, caused by the failure of the carrier to exercise due diligence, and negligence in the management of the ship concur in causing the loss, the carrier is liable for the loss, * * * Under these conditions, even though the failure to shut off the main water line in the engine room was negligence in the management of the ship, which I have found it was not, respondent would still be liable, inasmuch as unseaworthiness resulting from the failure of the carrier to exercise due diligence and negligence in the management of the ship concurred in causing the loss."

In the instant case the basic negligence of the officers of the "Iristo" consisted in their assumption, at the time when they were preparing for this voyage to Bermuda, that the chart which the master secured for the vessel's navigation at that place was correct and up-to-date although it showed on its face that it was not. Petitioners submit that this negligence does not come within the exemption from liability granted the carrier under Article IV, subsection 2 (a), of the Hague Rules (46 U. S. Code, Sec. 1304, subsection 2 (a)) and that the ruling herein by the Circuit Court of Appeals for the Second Circuit that the "Iristo" was seaworthy and the carrier entitled to the benefit of the foregoing exception, conflicts with both the American and British authorities on the subject.

POINT II.

The ruling of the Circuit Court of Appeals that a vessel equipped with a defective chart is seaworthy because data is physically on board by which the chart may be corrected, although the ship's officers do not know either that the data is on board or that the chart requires correction, is contrary to the principle adopted by this Court, by the British House of Lords, and by the Circuit Court of Appeals for the Second Circuit itself when differently constituted.

In *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*), this Court considered a case where cargo sustained damage as the result of the entry of sea water through a port hole. This Court pointed out that the iron covers over the ports:

> "were intended to be securely closed before any cargo was received; the person whose duty it was to close them or see that they were closed, supposed that that had been properly done; and the hatches were battened down with no expectation that any more attention would be given to the port covers during the voyage; but in fact the port was not securely covered, and there was apparently nothing to prevent the influx of water * * *." (181 U. S., at p. 224.)

This Court found that the ignorance of the ship's officers that the iron covers were open and the absence of any intention to make any examination of them during the course of the voyage, rendered the vessel unseaworthy. This Court quoted with approval the distinction between the principle of that case and the case of *The Silvia*, 171 U. S. 462, which had been drawn by the Circuit Court of Appeals for the Third Circuit (181 U. S. at pp. 226-7):

> "'But in the present case the port in question was

not designedly left open, and its shutters ought not to have been left unfastened. They would not "usually be left open for the admission of light", or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. *It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary,* and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived.'" (Italics ours.)

In *The Silvia* (*supra*) the facts were strikingly similar to those in *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*) with one exception. In *The Silvia*, also, the vessel sailed with porthole covers unfastened at a point where they could readily be reached and made secure and cargo thereby sustained damage; but in that case the porthole covers were designedly left open when the vessel sailed and the ship's officers planned to close them when the weather required it; but when heavy weather was encountered, it was forgotten that the porthole covers were not made fast.

In the present case, the Circuit Court of Appeals relied in large part upon its decision in *U. S. Steel Products Co.* v. *Amer. & Fgn. Ins. Co.*, 82 F. (2d) 752. In discussing that case the court said that the "very point" of the present case was there decided (Rec., p. 758). In *U. S. Steel Prod. Co.* v. *Amer. & Fgn. Ins. Co.*, the S. S. "Steel Scientist" stranded because the chart had not been corrected to show the position of a new lighthouse. In the vessel's chartroom were a Light List with supplement, Sailing Directions and a Notice to Mariners, each of which gave full information concerning the existence and char-

acteristics of the new light. The ship's second officer, in charge of the navigational equipment, knew of the existence of the light before the vessel sailed on her voyage; he placed a check-mark beside the entry in relation to it in the Light List Supplement and he planned to correct the chart during the course of the voyage before arriving near the light, to show its position. He negligently omitted doing so and another officer was on watch when the ship was navigated with relation to the light. It was held that seaworthiness did not require that the chart be corrected before the commencement of the voyage; and that the stranding resulted from negligence in management of the vessel because of the failure of the Second Officer to correct the chart before approaching the light, as intended at the start of the voyage; and that the vessel owner had exercised due diligence to make the vessel seaworthy and properly equipped since it furnished the officers with ample data which was readily available on board, giving full information concerning the new light by which the chart might have been corrected.

If the officers of the "Iristo" had known that there were Notices to Mariners on board which required examination in relation to Bermuda and it had been intended to examine them during the course of the voyage and make such correction of the chart as the Notices called for, the case might be considered comparable to *U. S. Steel Prod. Co.* v. *Amer. & Fgn. Ins. Co.* and within the ruling of this Court in *The Silvia* (*supra*). In holding that the physical existence on the "Iristo" of means to correct the chart brought the present case within the principle of *U. S. Steel Prod. Co.* v. *Amer. & Fgn. Ins. Co.*, the Circuit Court of Appeals must have considered irrelevant both the fact that the ship's officers were ignorant that there was any data on board which called for correction of the chart and also the fact that they intended from the

start to rely upon the defective chart. Therefore, it did not draw the distinction in principle which this Court did in *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*).

In dealing with petitioners' argument in relation to *The Silvia* (*supra*) and *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*), the Circuit Court of Appeals said (Rec., p. 759):

> "Scrutton, *L. J.*, whose judgment in a field like the present is of special weight, laid down the correct rule in *Madras Electrical Supply Co.* v. *P. & O. Steam Nav. Co.*, 18 Ll. List L. R. 93, as follows:
>
> > 'As I understand the authorities, a ship is not unseaworthy where the defect is such that it can be remedied on the spot and in a short time by materials available. The common case is a ship with an open port-hole. If the port-hole is a place where you can shut it at once, a ship is not unseaworthy because her port-hole happens to be open. If the port-hole is in a place where you cannot get at it during the voyage, and it is open, then the ship is unseaworthy. In the same way, I absolutely decline to hold that a ship is unseaworthy because there being the materials on board to be used for the purpose for which seaworthiness is required, the officers of the ship do not use the materials which are available.'
>
> The reasoning of Scrutton, *L. J.*, applies to the present case and reconciles any supposed differences between the decisions of *The Silvia*, 171 U. S. 462, and *Int. Navigation* v. *Farr*, 181 U. S. 218."

The petitioners find themselves unable to understand what the Circuit Court of Appeals had in mind when it referred to "supposed differences" between the decisions of this Court in the two cases mentioned: in *The Silvia*,

this Court held that the carrier was not liable and in *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* that it was liable; and the only difference between the facts of the two cases was that in the former it was known that the port hole covers were open and it was meant to secure them during the voyage, while in the latter, although the port holes could be readily reached and the covers made fast during the course of the voyage, it was not done because the ship's officers assumed that they had been made fast before the voyage commenced and, therefore, assumed that they needed no examination.

In *Madras Electrical Supply Co.* v. *P. & O. Steam Nav. Co.* (*supra*), to which the Circuit Court of Appeals referred, a heavy piece of cargo was damaged during the course of discharge because of the breakage of one of the derrick guy ropes. The cargo owner urged that in view of the weight of the cargo, an emergency preventer guy should have been fitted. There was ample rope available on board from which a preventer guy could have been constructed, but the master negligently determined not to fit one. It was held that as the master chose not to use available material to construct an emergency preventer guy, the accident resulted from negligence in management and not from unseaworthiness.

We submit that the facts of that case bring it within the principle of *The Silvia* (*supra*) rather than of *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*): the ship's officers had full knowledge of how to fit a preventer guy and knew that there was rope available for one. We have no doubt that this Court or any other American court would reach the same decision as did the English Court of Appeal.

In *The Lady Pike*, 21 Wall. 1, at pp. 14-15, this Court long ago pointed out that to be seaworthy a ship must

be manned "with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route". See also:

Tait v. *Levi*, 104 Eng. Reprints 686;
The Rolph, 299 Fed. 52, at p. 54 (C. C. A. 9);
Northern Commercial Co. v. *Lindblom*, 162 Fed. 250, 254 (C. C. A. 9).

In *The Schwan*, (1909) A. C. 450, sea water entered a vessel and damaged cargo because of faulty manipulation by the engineers of an unusual type of 3-way cock fitted to a certain pipe line, the ship's officers being ignorant of the characteristics of this cock. In holding the carrier liable Lord Atkinson held (p. 454):

> "And it certainly would appear to me that a due regard for the safety of the ship and cargo would have imperatively demanded that every member of the crew likely to use this cock, or interfere with it, should, before the voyage commenced, have been fully instructed as to its proper use and fully informed as to the danger to be avoided; since the best machinery may become a source of danger if placed under the control of the ignorant or unskilled, and the best equipped ship may become unseaworthy if her crew are unacquainted with the nature, structure, and proper use of the appliances with which she is furnished.
>
> "In my view it is therefore clear that this ship, equipped as she was, and manned by the crew she carried, was, at the time she was loaded, in fact unseaworthy."

The other Law Lords wrote opinions containing similar views.

In the accompanying petition (at p. 7) we pointed out that while there were two Notices to Mariners physically

on board the "Iristo" which gave data in relation to the wreck of the "Cristobal Colon", one was in a bundle in the master's dining saloon which he alone used, and was not available for examination by any of the ship's watch officers; and the other was in a drawer of the chartroom table with a large pile of other Notices; and that none of the officers knew that there was any data in any Notice in relation to Bermuda. The Circuit Court of Appeals cited the physical existence on the vessel of *both* Notices to Mariners as proof of the ship's seaworthiness (Rec., pp. 754, 758, 759).

The officer on watch at the time of the stranding was ignorant that there were any Notices to Mariners on the vessel except some old Norwegian Notices which were on board when he joined her a year before (Rec., pp. 520-1), and which, of course were issued long before the stranding of the "Cristobal Colon".

Accordingly, it is clear that if the rule adopted by the House of Lords in *The Schwan* is applied, it cannot be said that "every member of the crew likely to use" the chart was informed that there was data on board from which it could be brought up to date. The admitted facts are that none of the officers knew that there was any data in any Notice to Mariners on board with respect to the approaches to Bermuda; and the officer actually on watch at the time of the stranding did not even know that there were any recent Notices to Mariners on the vessel. Furthermore, the officers who knew of the recent Notices to Mariners conceded frankly that they had no intention of consulting them, as they were proceeding on the assumption that the chart was up to date.

In *Standard Oil Co. of N. Y.* v. *Clan Line Steamers, Ltd.*, (1924) A. C. 100, a ship was so constructed that when loaded with homogeneous cargo she was unstable unless

the ballast tanks were full. The master was ignorant of this quality of his vessel and when she was loaded with homogeneous cargo he pumped out his tanks and the vessel capsized. In the course of his opinion holding the vessel owner liable for the loss of the cargo, Lord Atkinson said (at p. 120):

> "It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage? There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy."

In discussing *Standard Oil Co. of N. Y.* v. *Clan Line Steamers, Ltd.* (*supra*), the Circuit Court of Appeals commented (Rec., p. 759) that the House of Lords held:

> "that the neglect of the owner to give the master the necessary information, with the resultant loss, rendered the owner responsible. The fault was plainly that of the owner, while here the master was supplied with everything necessary for navigation and only his neglect caused the accident."

In the *Clan Line* case, the owner's personal negligence became material because it withheld from the master information which it had concerning the necessity for keeping the ballast tanks full and the master was in no position to learn this for himself; the master's ignorance was not the result of his own negligence. Also, this question was considered in connection with the owner's

petition for limitation of liability. None of the Law Lords suggested that if the master's ignorance of the qualities of his ship had resulted from his own negligence in not making inquiry or tests before sailing, the negligence would relate to management rather than to seaworthiness.

The Circuit Court of Appeals said, in discussing one of its own prior decisions (Rec., p. 758):

> "The statement of L. Hand, *J.*, in *The Elkton*, 49 F. (2d) 700, 701, that 'unseaworthiness may depend upon the knowledge of the ship's company as to how far she has been in fact made ready' related to the case of a hidden and broken vent pipe through which fuel oil leaked from a tank and damaged a cargo of sugar. Knowledge of the defect which existed when the vessel sailed was held not to render the (fol. 761) vessel seaworthy. We know of no decision where the neglect of the ship's officers to perform the routine labor of examining mariners' notices so as to bring navigation charts up to date and make them safe for navigation has been imputed to the owner."

From its discussion of the three cases last mentioned, it is apparent that the Circuit Court of Appeals considered that ignorance of a ship's officers of the unreliability of their navigational equipment stands on a different footing from their ignorance of the unreliability or unusual characteristics of their ship's hull and fittings. Also, the Circuit Court of Appeals thought that before a vessel can be considered unseaworthy as the result of the ignorance of her officers, it must appear that that ignorance resulted from the vessel owner's personal negligence.

Petitioners submit that whether the ignorance of a vessel's officers results from their own negligence or from that of the vessel owner, the same principle is applicable.

Indeed, that was the very point determined by this Court in *Int. Mfg. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*) and by the English Court of Appeal in *Dobell & Co.* v. *Steamship Rossmore Co.* (*supra*).

CONCLUSION.

Petitioners respectfully submit that a writ of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the questions presented, involving interpretation of the Hague Rules adopted in many countries as the result of an international convention; because the decision in the present case is directly contrary to the settled law of the Fourth, Sixth and Ninth Circuits; and because the decision is in conflict with the decisions of this Court and of the British courts.

Respectfully submitted,

HENRY N. LONGLEY,
EZRA G. BENEDICT FOX,
Counsel for Petitioners.

Dated, New York, N. Y., November 30, 1943.

APPENDIX.

Hague Rules, Article III, subsection 1; Canadian Water Carriage of Goods Act, Article III 1;* United States Carriage of Goods by Sea Act, Section 3 (1), (46 U. S. Code, Sec. 1303, subsection 1).

"1. The carrier shall be bound before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

Hague Rules, Article IV, subsection 2 (a); Canadian Water Carriage of Goods Act, Article IV 2 (a); United States Carriage of Goods by Sea Act, Section 4 (2) (a), (46 U. S. Code, Sec. 1304, subsection 2 (a)).

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; * * *"

Harter Act, Section 3 (46 U. S. Code, Sec. 192).

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers

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* The Canadian Water Carriage of Goods Act is printed in full at pp. 643-653 of the record.

shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

(21)

Supreme Court of the United States

OCTOBER TERM, 1943

No. 523

MIDDLETON & COMPANY (CANADA) LTD., *et al.*,

Petitioners,

against

OCEAN DOMINION STEAMSHIP CORPORATION,

Respondent.

(Consolidated Cause)

BRIEF ON BEHALF OF OCEAN DOMINION STEAMSHIP CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WHARTON POOR,
JAMES MCKOWN, JR.,
of Counsel.

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Respondent.

(Consolidated Cause)

BRIEF ON BEHALF OF OCEAN DOMINION STEAMSHIP CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings in the District Court and in the Circuit Court of Appeals

These are admiralty causes brought by consignees or other persons interested in the cargo of the small Norwegian steamer Iristo, which stranded on a coral reef off the north coast of Bermuda on March 15, 1937, at about 3:00 P. M., and a few hours later became a total loss while being towed to port. The Iristo carried no passengers, and her crew sustained no injuries.

The respondent, Ocean Dominion Steamship Corporation, was not the owner of the Iristo. It was merely a *sub-time-charterer* (R. 706-707). The Iristo had on October 5, 1936, been time-chartered by her Norwegian owners to the Atlantic Maritime Corporation and, while this charter

was still in force and effect, the Atlantic Maritime Corporation had sub-time-chartered the vessel for "about six calendar weeks" to respondent (R. 148, 160). Neither of these charters was a demise (R. 155, 167) and the master and crew remained throughout in the service of the Norwegian owner.

Nevertheless, the libelants (now petitioners), who are almost entirely of Canadian or British nationality (R. 19-22, 80-81, 112-114), sought to fix liability upon the respondent, on the tenuous theory that it was the "carrier" of the merchandise, despite the fact that it was not the owner of the ship nor the employer of the master and crew.

After weighing all the evidence in this record of over 750 pages and in the many exhibits separately reproduced, the District Court dismissed the libels because of its two separate and distinct findings of fact:

(1) that the respondent was neither the carrier nor liable under the bills of lading (R. 686-698);

(2) that, *even if the respondent had been the carrier,* it would not have been liable, because the Iristo was seaworthy and due diligence had been exercised to make her so, and the loss was due to the "act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship" (R. 698-705), for which the carrier is not liable under the provisions of the Canadian Water Carriage of Goods Act, which is *admittedly applicable* (see petition, p. 9).

The District Court's opinion is at R. 686-705 and its findings of fact and conclusions of law at R. 705-721.

The essential *findings of fact* of the District Court are (R. 719):

> "34. On the voyage herein referred to, the 'Iristo' was seaworthy and due diligence had been exercised to make her seaworthy.
>
> 35. The respondent is not liable herein as a carrier."

The Circuit Court of Appeals said (R. 757-758):

"The District Court found that the Iristo was seaworthy and determined that the loss resulted from an act, neglect, or default in the navigation or management of the ship for which there was no liability on the part of the carrier or the ship under Art. IV 2(a) of the Rules annexed to the Canadian Water Carriage of Goods Act. It dismissed the libels for this reason and also for the reason that the bills of lading were contracts of carriage between the shipper and the shipowner and not contracts of carriage by the subcharterer, who is the respondent in this suit. Inasmuch as we are persuaded that the libellants must fail for the first reason, that is to say, because the Iristo was seaworthy, it becomes unnecessary to decide whether the respondent was the carrier, or was a mere agent of the shipowner who incurred no personal obligation for the loss.

The cargo of the Iristo was carried under the Canadian Water Carriage of Goods Act of 1936 which, in Article IV, provides as follows:

'1. Neither the carrier nor the ship shall be liable for loss or damage arising from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, * * *

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; * * *'

We hold that the Iristo was properly found seaworthy because of the notices on board which disclosed the existence and location of the wreck and that the failure to bring the chart down to date, or otherwise to use the information available, when navigating in

> the vicinity of Bermuda, was a fault 'in navigation or management.' This very point was involved and passed upon by the present court in *United States Steel Products Co.* v. *American & Foreign Ins. Co.*, 82 F. (2d) 752. There the 'Steel Scientist' was found seaworthy, in spite of the fact that her charts had not been brought up to date, because there were records on board from which they could be readily corrected before the vessel reached the waters in which the information became necessary for proper navigation. It would seem equally foolish to hold a ship unseaworthy because her master employed a chart that had not been brought up to date, when he had a correct chart on board that he had forgotten to use, and to hold the Iristo unseaworthy because her officers employed a deficient chart when the means to correct it in good season were available."

There are thus concurrent findings (without any dissent) that the Iristo was seaworthy and that the loss was due to "act, neglect or default * * * in navigation or management". This is admitted in the petition, p. 3.

It is elementary, of course, that this Court will not review concurrent findings of fact of the lower courts.

> *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271;
> *The Wildcroft*, 201 U. S. 378, 387 (seaworthiness held question of fact);
> *Luckenbach* v. *W. J. McCahan Sugar Ref. Co.*, 248 U. S. 139, 145 (seaworthiness *vel non* a question of fact).

The findings above referred to of seaworthiness and due diligence are findings of *ultimate facts, Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67, and necessarily required the dismissal of the libel. Petitioners do not claim to be entitled to succeed if these concurrent findings of the lower courts stand; they ask this Court to set them aside.

The Events Leading Up to the Stranding

To show the fallacies in petitioners' contentions, a brief summary of the events leading up to the stranding is required.

On December 23, 1936, the U. S. Hydrographic Office issued a "Notice to Mariners" No. 52 of 1936, reading as follows (R. 654, 655):

> "(3643) BERMUDA ISLANDS — North Rock Light — Wreck northeastward. — The wreck of a vessel, which is conspicuous, lies stranded 2.57 miles 77° from North Rock Light.
>
> Approx. position: 32° 29′ N., 64° 43′ W. (N.M. 52, 1936). (Notice to Mariners 48 (2325), Admiralty, London, 1936.) * * *"

Neither this notice nor any publication of any Hydrographic Office identified the "wreck" as the Cristobal Colon (R. 656-657). This notice in stating that the wreck was "conspicuous" was *more informative* than the wreck symbol which would have been found on Chart No. 360 had the latter been corrected up to date when purchased. (The symbol appears on Exhibit F, R. 674.)

The master of the Iristo had on board *two* copies of the above referred to "Notice to Mariners", the first obtained at Boston on February 13, 1937, and the second at Philadelphia on March 3, 1937 (R. 741-742), *only twelve days prior to the stranding.* The petition is wholly inaccurate in stating (p. 7) that these notices were secured "some months" before the arrival of the Iristo at Halifax.

It is the common practice of ship's officers to make use of the "Notices to Mariners" to bring the ship's charts down to date. This practice is referred to by the Circuit Court of Appeals as "the routine labor of examining mariners' notices so as to bring navigation charts up to date" (R. 758).

On arrival at Halifax, the first loading port, on March 8, 1937, the master sought to purchase British Admiralty Chart No. 335, a large scale chart of the Eastern section of Bermuda (R. 457, 458, 716). Chart No. 335 was out of stock, and he was offered British Admiralty Chart No. 360, a chart of the whole island (R. 457). The master indicated a preference for chart No. 335, and stated he would try to obtain No. 335 at St. John, N. B., his next port of call (R. 458, 716).

The Iristo arrived at St. John on March 10, 1937, and the master there purchased from the official sub-agent for Admiralty charts chart No. 360, chart No. 335 not being available (R. 716-717). The British Admiralty instructs its sub-agents to see that the charts in their possession are kept up-to-date and sends them Notices to Mariners for that specific purpose (R. 461, 478-479). In the present instance, that duty seems not to have been performed, as the chart sold the master of the Iristo (Exhibit X) does not bear any reference to the "wreck".

The Iristo sailed from St. John on March 11th with ample equipment for navigational purposes, if that equipment were properly used. This included wireless by which communication could be had and bearings could be obtained from shore stations (R. 520, 563), a patent log which had been carefully checked (R. 560), a number of nautical publications giving particulars as to lights, tides, sailing directions, etc. (R. 552), British Admiralty Chart No. 360 and two copies of Notices to Mariners No. 52 of 1936, which made reference to the "wreck" and stated its exact location, *supra*, p. 5, R. 717.

After an uneventful voyage, the Iristo began to near Bermuda on March 15th.

At noon on that day, chart No. 360 was placed on the chart table and used for navigation (R. 608, 714-715). After ascertaining the ship's position, the master and chief officer laid off a course of 100° true, which they calculated would take the Iristo about three miles to the northward

of North Rock Light, which lies on the reef off the north coast of Bermuda (R. 559, 715).

At 12:30 P. M., Lunderbye, the second mate, relieved the first mate who went off watch (R. 503-504). The master was then in charge of the navigation, visiting the navigating bridge as occasion required (R. 540, 559). While the weather was slightly misty, the visibility remained good (R. 556).

On the Iristo's nearing North Rock Light, the master directed the second mate to take a bow and beam ("four point") bearing of the light to ascertain the approximate distance of the Iristo therefrom (R. 715). The light was abeam of the Iristo at 2:50 P. M. (R. 505) and after taking the bearing the mate assumed the Iristo to be 1½ miles distant from the light (R. 715), and ordered the helmsman to alter the course 15° to the northward to 85° true (R. 506). Immediately thereafter the master, believing that he saw a steamer (in fact the wreck of the Cristobal Colon) a little on his starboard bow, changed the Iristo's course sharply to starboard, which was toward the reefs (R. 561). Had the master consulted the chart, he must have realized that this maneuver would put the ship ashore (R. 421).

The Iristo stranded at 3:00 P. M. (R. 715). As she could not be released by her own efforts, a wireless was sent for a tug, which arrived at 6:00 P. M. (R. 512). She was then floated from the reef but sank while being towed to port (R. 512-513).

FIRST POINT

The lower courts correctly found that the Iristo was seaworthy, that due diligence had been exercised to make her so, and that the loss was due to causes for which there was no liability. These were questions of fact under both Canadian and American law and the findings are amply sustained by the evidence. Petitioners fail to show any sufficient reason for granting a writ of certiorari.

(a) Legal principles applied in the controlling foreign decisions.

As the case is admittedly governed by Canadian law (Petition, p. 9), it is obvious that the controlling decisions are those which would be considered binding precedents had the case been tried in a Canadian Court.

Canadian courts are bound by decisions of the Privy Council and also by decisions of the House of Lords because the House of Lords is the final authority as to the common law, *Robins* v. *National Trust Co.*, L. R. [1927] A. C. 515, 519 (R. 286).

By stipulation it was agreed that foreign decisions might be referred to (R. 147, 300), and the following were accordingly brought to the attention of the lower courts:

In *Steel* v. *State Line SS. Co.*, L. R. 3 A. C. 72, in the House of Lords, a ship had loaded a quantity of wheat which on arrival was found to have been damaged by seawater. The bill of lading did not modify the warranty of seaworthiness but provided that the ship should not be liable for perils of the seas, etc., even though due to negligence of the ship's company.

The jury returned a special verdict which stated, in substance, that through the negligence of some of the crew a port on the orlop deck was insufficiently fastened, with the result that water entered thereby some five days after the

ship was at sea, the port being about a foot above the water line when the ship was loaded.

Lord Blackburn, whose opinion has frequently been cited as authoritative, held that the question whether or not the ship was unseaworthy was *one of fact* and that except in an extreme case the decision of the jury, whether for plaintiff or defendant, would be determinative.

Lord Blackburn said (pp. 90, 91) that:

> "if in the inside the wheat had been piled up so high against it [the port] and covered it, so that no one would ever see whether it had been so left or not, and so that *if it had been found out or thought of*, it would have required a *great deal of time and trouble* (*time above all*) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light—in such a case as that no one could with any prospect of success, ask any reasonable people, whether they were a jury or Judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, * * *.
>
> * * * it will be a question, taking the whole circumstances together, was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon the whole circumstances and the whole of the evidence. *I have merely indicated two extreme cases which I think are quite possible,* and in one of which I think it is quite clear that nobody would say she was seaworthy; in the other case I think anyone would

> say she was seaworthy. *These are only two extreme cases—there must be plenty of room for dispute between the two.*" (Italics ours.)

Lord Blackburn states that time is the important factor and the correction in the present case could have been made in less than a minute (R. 408).

Applying the decision in *Steel* v. *State Line* (*supra*), the question as to whether or not the Iristo was seaworthy is one of fact which was decided in favor of the respondent by the District Court (Finding 34, R. 719) as a question of *fact* (Opinion, R. 704), and affirmed by the Circuit Court of Appeals on the same basis (R. 759).

The rule that any defect or deficiency which can be satisfactorily dealt with in the course of the voyage, and ordinarily is so dealt with, is not unseaworthiness, is well settled in the English courts. In *Arnould on Marine Insurance*, 12 Ed., at p. 967, it is said:

> "The fact that some precaution has been neglected at the time of sailing does not make the ship unseaworthy, if she be in such a state and so equipped that, if the master and crew do their duty, no extra danger will be incurred."

In *Ajum Goolam* v. *Union Marine Ins. Co.*, L. R. [1901] App. Cas. 362, it was held that a ship which capsized soon after sailing was not unseaworthy because of slack water in a tank which could have been pumped overboard on the voyage. The Privy Council said (p. 371):

> "Even if water in the tank might be a source of danger, the judgment of Lord Blackburn in *Steel* v. *State Line Steamship Co.* (3 App. Cas. 72) shews that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board."

In *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co.*, L. R. [1924] App. Cas. 522, the following rule was stated by Lord Sumner (pp. 558-559):

> "It appears to me to have been decided, that, even if the case of something which is a defect in the ship herself, structural or accidental, sufficient to render the ship unseaworthy if not properly handled or adjusted, though I can find no such defect here, it would be an answer to an allegation of unseaworthiness to show that, in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger."

In *Madras Electrical Supply Co.* v. *P. & O. Steam Navigation Co.*, 18 Ll. List L. R. 93 (Ct. of Appeal), Lord Justice Scrutton, the author of the well-known book on Charter-parties, said (pp. 97-98):

> "As I understand the authorities, a ship is not unseaworthy where the defect is such that it can be remedied on the spot and in a short time by materials available. The common case is a ship with an open port-hole. If the port-hole is in a place where you can shut it at once, a ship is not unseaworthy because her port-hole happens to be open. If the port-hole is in a place where you cannot get at it during the voyage, and it is open, then the ship is unseaworthy. In the same way, I absolutely decline to hold that a ship is unseaworthy because, there being the materials on board to be used for the purpose for which seaworthiness is required, the officers of the ship do not use the materials which are available."

In *Cunningham* v. *Colvils,* 16 Sess. Cas., 4th Series, 295, a steamer had sailed from Seville having filled her boiler with muddy water from the river. Some three days after sailing, heavy weather came on and the crowns of the wing furnaces in her boiler collapsed. As a consequence of inability to maintain steam pressure, she became a total loss.

The shipowners defended a suit brought by cargo on the ground that the muddy water could have been pumped overboard, so that the loss was not due to unseaworthiness but to "errors or negligence of navigation," for which the

shipowners were not liable. The engineers "did not know there was any mud in the boiler to the extent of being a source of danger" (p. 306).

The decision of the Court of Sessions was unanimous in favor of the shipowners. Lord Adam said (p. 305):

> "They (the shipowners) say that if the presence of the mud in the boiler constituted such an element of danger as to produce unseaworthiness if not removed, yet it could and ought to have been removed as soon as the vessel got to sea by blowing it out of the boiler and taking in sea water. This, they say, is a method quite simple and known to every engineer, and that if the vessel was lost by reason of the presence of the mud she was not lost because of unseaworthiness, but because of the error or negligence of the engineer in not blowing it out of the boiler. In my opinion the defenders are right in this contention, and it is supported by the principles laid down in the House of Lords in the case of *Steel & Craig*, 4 R. (H. L.) 103 (*Steel* v. *State Line*, 3 App. Cas. 72)."

Petitioners cite *Dobell & Co.* v. *s/s Rossmore Co.*, [1895] 2 Q. B. 408, a porthole case, where "there were no facilities for closing the porthole."

The ship's unseaworthiness was admitted (see the report in 8 Asp. M. C. N. S. 33), the defense being rested on other grounds.

Standard Oil Co. v. *Clan Line*, [1924] A. C. 100, and *The Schwan*, [1909] A. C. 450, cited by petitioners, are both cases of dangerous and unusual construction or equipment.

In *Standard Oil* v. *Clan Line, supra*, the vessel was of the unusual "turret" type of construction. A peculiar feature of the vessel was that she would capsize if her ballast tanks were pumped out when she was loaded with a homogenous cargo. Her owners had been warned of this by the builders, but failed to notify the master. He did not know of the danger, and had no means of ascertaining it.

In *The Schwan, supra*, the vessel was fitted with a so-called "three-way cock" of a dangerous and unusual construction [1909] A. C. at p. 463.

Unlike the chart (Exhibit X, R. 679), which was always open to view, there was no way in which the dangerous features of the "three-way cock" could be ascertained.

There was nothing "unusual, improper and dangerous" in the equipment of the Iristo. The chart No. 360 purchased at St. John was, it is true, not corrected up to date, but it is the ordinary practice to correct charts from Notices to Mariners during the voyage (R. 402, 613).

Standard Oil Co. v. *Clan Line, supra,* was distinguished by Lord Justice Scrutton in *Madras Electrical Supply Co.* v. *P. & O. S. N. Co., supra,* at page 98:

> "The master of a particular turret ship was not given instructions from the builders which would have told him very important facts as to the stability of the ship, and in consequence of not being told that, he pumped out his ballast tanks, with the result that the ship turned turtle. It seems to me to be an absolutely different case from a question of the ordinary lifting of heavy weights, which comes within every master's experience, and where the master in lifting a particular heavy weight does not use a rope which he had on board, but which he might have used."

The case at bar is parallel to the above. The correction of charts by Notices to Mariners comes within "every master's experience" and the master had on board a Notice to Mariners giving the information which he might have used.

Furthermore, the finding is in the case at bar that the owners had fully complied with all of their obligations (Findings 32, 33, R. 718, 719).

The *Clan Line* case, *supra,* was again distinguished in *Cosmopolitan Shipping Co.* v. *Hatton,* 35 Com. Cas. 113, as follows (pp. 131-132):

> "There are obviously cases where it is the duty of the owner to give his master specific instructions about some technical information the owner has upon some special point about the ship which a master could not be expected to know. An example of this is special information as to the stability of the ship, the failure

> to communicate which was held to be negligence of the owners in *Standard Oil Company* v. *Clan Line,* [1924] A. C. 100. But I cannot think it is necessary for an owner sending a certificated master of experience out on a voyage to give him detailed instructions in all the ordinary points of a master's duty, such as the condition of sails and the 'tightness and staunchness of the hull.' "

The correction of charts is one of the "ordinary points of a master's duty."

Again, in *Tempus Shipping Co.* v. *Louis Dreyfus & Co.,* [1931] 1 K. B. 195, the *Clan Line* case was distinguished on similar grounds (p. 204).

The Schwan, supra, was commented upon by Lord Sumner in *Elder, Dempster & Co.* v. *Paterson* ([1924] A. C. at 559), as follows:

> "The reasoning of your Lordships' House in *The Schwan,* [1909] A. C. 450, 463, shows that, assuming the three-way cock to have been an unfit contrivance in itself, the ship would nevertheless have been seaworthy, if those in charge *could in the ordinary course have seen its risks* and known how to meet them." (Italics ours.)

The navigators of the Iristo "could in the ordinary course have seen" that the chart bore no recent corrections, and then have examined the notices.

In *The Touraine,* [1928] P. D. 58, cargo was injured by leakage from a pipe which had been broken by one of the seamen, who had used an iron rod to clear the pipe of an obstruction. Mr. Justice Hill said (p. 67):

> "The question I have to ask myself is, I think, that indicated by Lord Gorell in *The Schwan* ([1909] A. C. 450, 463), and it is this: 'Was the vessel in respect of this pipe reasonably fit to be worked in the way which might ordinarily be expected?' I think it was. If so, then, in respect of the pipe the ship was not unseaworthy nor the strong room unfit or unsafe."

With an adequate chart and with Notices to Mariners on board, the Iristo was "reasonably fit to be worked in the way which might ordinarily be expected."

The Schwan, supra, was also distinguished by Hough, J., in *The Miguel de Larrinaga,* 217 Fed. 678, on the ground that the loss was due to the use of a "peculiar and new-fangled cock," and he held that there was no liability for cargo damage due to the officers' failure to use ordinary equipment readily available.

Petitioners also refer to *Foreman* v. *Federal S. N. Co.,* [1928] 2 K. B. 424; *Gosse Millerd* v. *Canadian Govt. Marine,* [1929] A. C. 223, and *Hourani* v. *Harrison,* 32 Com. Cas. 305. These last three decisions, however, did not deal with any question of seaworthiness, but only with whether the loss was due to act, neglect or default in management or navigation or to failure to care for the cargo. They are not in point here.

(b) To recover under the Canadian Act petitioners had to prove both that the Iristo was unseaworthy and that the unseaworthiness caused the loss (R. 207, 699, *Joseph Constantine S.S. Line* v. *Imperial Smelting Co.,* [1942] A. C. 154). Even had petitioners sustained this burden, which they did not, there would still be no liability because of the finding that due diligence was exercised (R. 719, 648-9). The American decisions cited by petitioners are inapplicable.

While the American decisions are not controlling, they will be found to support the position of the respondent.

A recent decision directly in point is *U. S. Steel Products Co.* v. *Amer. & For. Ins. Co., The Steel Scientist,* 11 Fed. Supp. 175, aff'd 82 F. (2d) 752, also referred to in petitioners' brief.

The Steel Scientist, on sailing from New York for the Panama Canal, obtained Notices to Mariners and other documents from which her charts could be corrected. The Notices to Mariners were not, however, used and the ship stranded because the chart in use did not indicate the

installation of a new lighthouse. It was held that the failure of the navigating officers to make use of the Notices to Mariners was an error in navigation and not unseaworthiness. The rule was thus stated in the District Court at page 180:

> "If an owner provides his vessel with the informative equipment, such as charts, Light Books, Supplements bringing them up to date, reasonably sufficient to conduct the safe navigation of the vessel, and the information is supplied in such form as to be available to the navigator with a fair amount of effort, the vessel is not unseaworthy * * *."

In the Circuit Court of Appeals it was said, page 754:

> "* * * a ship is well found, if she has the proper documents on board, and if when she sails, such of her charts and light lists are corrected as cover the waters she will enter before her officers will have ready opportunity to correct them."

In *The Silvia,* 68 Fed. 230 (C. C. A. 2), aff'd 171 U. S. 462, also cited by petitioners, a steamer sailed from Matanzas for New York having on board a cargo of sugar. One of her compartments, which had been fitted for the carriage of passengers, contained on this voyage only some ropes and gear. There were ports in this compartment fitted with glass covers and also with additional covers of iron. None of the ports in the compartment were closed, otherwise than by the glass covers. Soon after getting out to sea, rough weather was encountered and it was found that the glass cover of one of the ports had been broken and that sea water had entered, damaging the cargo.

The Circuit Court of Appeals said (p. 231):

> "The officers of the vessel regarded the glass covers as strong enough to resist ordinarily heavy seas, and seem to have left the iron covers unclosed intentionally upon the present voyage, in order that the compartment might be light in case it became necessary to visit it. In every other respect, save that when she

> sailed, the iron shutters were not fastened over the ports, the vessel was tight, staunch, and fit for the voyage."

It was held that the ship was not unseaworthy, the Court saying (p. 231):

> "Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment, and close them with the iron covers."

This Court affirmed on the same grounds; see page 465 of 171 U. S.

See, too:

The Mexican Prince, 82 Fed. 484, aff'd on opinion below 91 Fed. 1003, C. C. A. 2.

Jay Wai Nam v. *Anglo-Amer. Oil Co.,* 202 Fed. 822, C. C. A. 9.

The Oritani, 40 F. (2d) 522, aff'd on opinion below 54 F. (2d) 1075, C. C. A. 3.

In all of the above referred to American cases the Harter Act was involved, which subjects the ship to burdens much heavier than does the Canadian Water Carriage of Goods Act which latter Act even abolishes the warranty of seaworthiness (R. 643).

In the American decision of *International Navigation* v. *Farr,* 181 U. S. 218, cited by petitioners, the port not properly fastened was in a cargo compartment and was supposed to be securely closed before the vessel sailed. In a suit under the Harter Act it was held that the vessel was unseaworthy. This Court said (pp. 226, 227):

> *"Nor do we say that the liability rests alone on the ignorance of the officers that the port covers were not securely fastened.* This is not a case where it appears that the port would ordinarily have been left open, to be closed as the exigency might require, and where

> failure to close it during the voyage might be an error or fault in management. * * * *It was neither intended nor expected that they* [the ports] *would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary,* and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived." (Italics ours.)

The above quotation clearly differentiates the case at bar from the decision then made. A chart not to be used for four days after sailing need not be corrected before sailing, but should be corrected during the voyage "as the exigency might require." Charts require "attention at sea" and *"control of them in the course of navigation and management"* is *"necessary"*. There was a duty to exercise "control" of the chart during the voyage, and the failure to exercise such control was neglect in management or navigation.

In such a case the fact that the officers do not know, on sailing, that the chart requires correction is immaterial because there is no duty to exercise "control" (i.e., correct the chart) except during the voyage, and, where the chart is not to be used to navigate by until a later stage of the voyage, there is no duty to examine the chart *before sailing* for the purpose of determining whether it requires correction from the Notices to Mariners.

It will further be noted that this Court held that the question of seaworthiness was one of fact to be decided in view of all the circumstances of the case. In the case at bar, that fact question has been decided in favor of respondent.

Petitioners also cite a "crippled ship" case, *The Elkton,* 49 Fed. (2d) 700, C. C. A. 2, where a steamer's tank top had been damaged and a surveyor recommended that it should not be filled with fuel oil on the voyage. Nevertheless the engineer did fill the tank with fuel oil, resulting in damage to cargo. The decision in favor of the cargo

was based on the ground that the ship was not seaworthy on sailing with the damaged tank top and hence that the Harter Act did not afford a defense. The Court pointed out that the Harter Act gives the owner a "privilege * * * an immunity dependent upon the condition that he use due diligence to make his ship 'in all respects' seaworthy" and said that the ship's unseaworthiness imposed on the shipper an "added risk", which risk "the statute [Harter Act] does not impose upon the shipper" (p. 701):

The Iristo was not an "unseaworthy ship" nor is there any "condition" precedent under the Canadian Act; the decision is consequently not pertinent.

The Elkton, supra, also is inconsistent with the rule stated by Lord Sumner in the House of Lords decision of *Elder, Dempster & Co.* v. *Paterson, supra,* p. 11, where he said that a defect in a ship "structural or accidental" would not constitute unseaworthiness if "in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger."

Petitioners also cite *The Maria,* 91 F. (2d) 819. The obvious difference between *The Maria* and the case at bar is that in *The Maria* the chart was not up-to-date *and the master had no Notices to Mariners by the use of which the chart could be corrected.* Petitioners' counsel frankly admitted this distinction in opening the case to the District Court, and, although *The Maria* was cited to the Circuit Court of Appeals, that Court found any discussion of the case unnecessary.

Other American cases cited by petitioners do not call for comment.

(c) The incorrect premises and fallacious theories on which petitioners rely.

Petitioners state, p. 3, "none of the facts are in dispute." On the contrary, the alleged facts and premises on which petitioners base their contentions are vigorously disputed

because they are supported neither by testimony nor by finding. See this brief, pp. 5, 20, 23.

One of petitioners' contentions is that the Iristo was unseaworthy because the master had no "intention" of making use of the Notices to Mariners.

It is the ordinary duty of a master to examine the charts and notices before the charts are actually put into use and within a sufficient time to make any necessary corrections. Captain Stephensen testified that he performed this duty personally, except in specific instances when he delegated it to his chief officer (R. 569), and that he "went through all the charts" relating to the voyage to Bermuda (R. 575). This examination must have been made on the four-day voyage to Bermuda as the master's time at St. John was occupied with other matters (R. 484, 550).

This chart (Ex. X separately reproduced) had been purchased only five days before at St. John from an official sub-agent of the British Admiralty and was presumably corrected up to the date of the latest available Notice to Mariners (*supra*, p. 6), and, if it had been so corrected, no examination of Notices to Mariners was called for. There was nothing on the chart to indicate that it was not up-to-date except for the statement thereon that the latest printed correction had been made in 1932. This was by no means a definite indication that a notice issued in 1936 was omitted because no notices relating to this chart might have been issued since the last correction.*

The chart was again examined at least three hours before the stranding, when it was laid on the chart table at noon on March 15th and the Iristo's course plotted thereon, *supra*, p. 6.

The weather was fine and the Iristo was approaching Bermuda in broad daylight. No real navigational difficulties were to be expected until the Iristo was far beyond North Rock Light. The master no doubt considered the

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* The statement in the petition (p. 10) that the chart "disclosed on its face that it was five years out of date" is untrue.

chart sufficient for his purposes without minute scrutiny, and that would indeed have been the case had it not been for the disastrous and incautious alteration of course just prior to the stranding. Had the master been more cautious, he could easily have consulted the Notices to Mariners procured at Boston, which were at hand in the chart room (R. 613, 717). The very first of these notices, No. 52 of 1936, contained the reference to the "wreck" (R. 741). His failure so to do was an "act, neglect or default * * * in management or navigation."

The master's alleged "intention" on sailing from St. John not to examine the Notices to Mariners, was nonexistent in fact. There was no reason for the master to form any "intention" with respect to a chart which would not be used until four days from St. John.

In *U. S. Steel Products Co.* v. *Amer. & For. Ins. Co., supra,* p. 15, Judge Learned Hand answered the contention that a chart must be checked against the Notices to Mariners before the voyage began, as follows, p. 753: "it need not have been if before the ship reached the waters which the charts and the lists covered they could conveniently be brought up to date; if that was not done, it was due to the negligence of the crew during the voyage, not to faulty equipment, and the ship was not unseaworthy."

The master testified that he did examine the Notices to Mariners, probably after leaving St. John, at R. 575:

> "Q. When did you do that? A. A day or two after I went from St. John or perhaps it was when I was on the way up to St. John or it may have been when I was in Halifax."

After the ship was at sea the master would have ample time (four days) to look through the charts and the Notices to Mariners and he would examine his charts and Notices to Mariners with respect to the several other ports at which he was to call after leaving Bermuda.

In making that examination he presumably, as he testified, "overlooked" the reference to the "wreck" (R. 563), or, if he did see it, may have considered it unimportant and failed to note it, particularly as it was off the ordinary course. A "wreck" which had gone ashore at least three months before could not be considered reliable or important for navigational purposes.

The Circuit Court of Appeals said (R. 755):

> "Doubtless through *inadvertence* he (the master) failed to have chart No. 360 corrected to date after leaving St. John, and relied on No. 360 as it was when approaching Bermuda." (Italics ours.)

This is a finding that it was not lack of *intention,* but an oversight or lack of *attention,* after leaving St. John, that resulted in the chart's not being corrected.

The testimony amply supports the findings (1) that the Iristo was seaworthy; (2) that due diligence was exercised to make her seaworthy; (3) that the loss was due to an "act, neglect or default" in navigation, etc. See findings 32 and 34 (R. 718, 719; *supra,* p. 4).

The Circuit Court of Appeals further pointed out that the master and mates were men "of wide sea experience", that there was "no negligence in the selection of officers", and that the negligence was "not that of the owner" (R. 755).

In the "specifications of error" on which petitioners rely (Brief p. 22; see, too, petition pp. 9, 15) this Court is asked to set aside the concurrent findings below of seaworthiness and due diligence. These "specifications" are:

1. That there was negligence of the officers "before the commencement of the voyage." The short answer to this is that there was no such negligence, negligence being negatived by finding No. 34 (R. 719) that "due diligence had been exercised to make her (the Iristo) seaworthy."

Indeed, in *Steel* v. *State Line, supra,* p. 8, seaworthiness was held to be a question of fact even if there were negli-

gence before sailing. A ship is not unseaworthy "by reason of something objectionable but easily curable by those on board" (quoted from an opinion of the Privy Council, *supra*, p. 10); See, too, *supra*, pp. 9-11.

2. That the Iristo was unseaworthy because "both the defective condition (of the chart) *and the availability of means to correct it* are unknown to the vessel's officers."

Here there is a serious error in a statement of fact. The master and chief officer knew that there were Notices to Mariners on board which could be used to correct the chart (R. 553-555, 613).

The chart was "easily curable by those on board" and hence did not render the ship unseaworthy.

If after a ship puts to sea the master finds a crack in the mirror of his sextant, which defect he is able to remedy in a few seconds by the substitution of a new mirror, that defect surely does not render the ship unseaworthy even if the master believed the sextant to be sound when the ship sailed.

There are a number of other incorrect and misleading statements of fact in the petition and brief, but it seems unnecessary to refer to all of them in detail.

At p. 7 of the petition it is said, "None of the Notices to Mariners was ever examined by the ship's officers to ascertain if they contained any data in relation to Bermuda after they learned that they were to sail there * * *." This is contrary to the testimony of the master (*supra*, p. 21) that he went through the Notices after being notified at Halifax that he was to call at Bermuda.

(d) Petitioners fail to show any sufficient reason for granting a writ of certiorari.

Petitioners list four reasons, petition, p. 17:

(1) That the case at bar is "in conflict with the law as settled in the Fourth, Sixth and Ninth Circuits." No cases under the Canadian Water Carriage of Goods Act have ever been decided in those Circuits. The Fourth Circuit

case is *The Maria, supra,* p. 19, where the master had no Notices to Mariners with which to correct his chart, so that the facts were entirely different from those in the case at bar. Furthermore, the case was governed by the Harter Act, an entirely different statute. In the Sixth Circuit petitioners apparently rely upon a *District Court* decision, *Spencer Kellogg* v. *Great Lakes Transit,* 32 F. Supp. 520, which arose under the *United States Carriage of Goods by Sea Act.* That decision is in no way opposed to the case at bar. The decisions in the Ninth Circuit, which arose under the Harter Act, are also not applicable to, nor opposed to, the case at bar.

Petitioners have cited these cases merely to show that the lower courts should have found the facts differently from what they did find them to be.

2. That "the law in the present case is contrary to the principle of decisions of this Court and of the British House of Lords."

We submit that the lower courts have followed the controlling British decisions in the Privy Council and House of Lords. This Court has never decided a case arising under the Canadian Water Carriage of Goods Act or any like statute. The decision below is in accord with the decisions of this Court in so far as they are applicable.

3. That this Court should "resolve any conflict as to their (the Hague Rules) proper interpretation." If the Court were to adopt this proposal, almost every cargo damage case would have to be passed on by this Court.

4. That "the questions presented are of great commercial importance * * * under this decision a carrier can escape all liability for loss of cargo resulting from insufficiency of navigational equipment of his vessel by leaving the whole matter in the hands of ship's officers."

The decision below does not go so far. All that it holds is that seaworthiness is a question of fact, and that a ship is not unseaworthy, as a matter of law, because the crew fail to perform their duty on the voyage.

The District Court found the ultimate facts of seaworthiness, due diligence, and that the loss was due to an excepted cause. Petitioners seek to upset those findings, admitting that they were concurred in by both courts (petition, p. 3). We submit that there is no question of law for this Court to review.

SECOND POINT

The decision below is also correct on the wholly independent ground that the respondent was not the carrier nor liable under the bills of lading.

It is not appropriate to argue the above question of fact at length. The Court is accordingly referred to the opinion of the District Court (R. 686-698) and findings 1-17 (R. 705-714) and conclusions of law 1, 2, 3 (R. 720). Also to the exceedingly clear and enlightening testimony of Mr. Arthur N. Carter, who was called as respondent's expert as to Canadian law. Mr. Carter, a Master of Arts and Bachelor of Civil Law of Oxford University and a solicitor and barrister of the Supreme Court of New Brunswick, covered the entire subject comprehensively (R. 275-338).

As the libels were correctly dismissed on the ground above referred to, the question as to whether the respondent was also not liable because of the exemptions provided in the Canadian statute is in fact an academic one.

Helvering v. *Gowan,* 302 U. S. 238, 245-6.
J. E. Riley Investment Co. v. *Commissioner,* 311 U. S. 55, 59.

LAST POINT

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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